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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1950.

No. 472

IN THE MATTER OF
LUSTRON CORPORATION,
BANKRUPT.

LAFAYETTE STEEL CO., INC.,
*Petitioner,*

*vs.*

LUSTRON CORPORATION, ET AL.,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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LAFAYETTE STEEL CO., INC.,
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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Lafayette Steel Company, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered October 23, 1950 (R. 327).

## OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit (R. 321-326) is reported at 184 F. (2d) 798.

## JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 23, 1950 (R. 327). A timely petition for rehearing was filed on November 6, 1950 (R. 327) and was denied on November 10, 1950 (R. 328). The jurisdiction of this Court is invoked under Title 28 U. S. C., sec. 1254(1).

## QUESTION PRESENTED.

Petitioner, in good faith, before bankruptcy proceedings were begun against the debtor and with no knowledge or notice that any bankruptcy proceedings were imminent, purchased certain property at a judicial sale held by a United States District Court in Ohio in a general equity receivership proceeding. After the sale was held, but before it was confirmed, a petition in bankruptcy against the debtor was filed. The filing of the bankruptcy petition occurred within four months after the receivership began. After the bankruptcy petition was filed, the sale was confirmed by the Ohio court. Under Ohio law petitioner was entitled to have the sale confirmed and was the equitable owner of the property even before the sale was confirmed. Section 67a(3) of the Bankruptcy Act declares that the title of a *bona fide* purchaser of property at a judicial sale shall be valid even if the lien under which the sale was held should be rendered void by bankruptcy proceedings. The question of first impression presented is: Does such a *bona fide* purchaser lose its rights to the property under Ohio law despite the proviso of Section 67a(3) of the Bankruptcy Act because bankruptcy intervened between the holding of the judicial sale and its confirmation?[1]

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1. As a precautionary measure we note the following additional questions which are presented:

(1) Whether the rights and title of petitioner as a purchaser at an Ohio judicial sale must be determined under Ohio law. (2) Whether the court below properly held that Section 67a(3) of the Bankruptcy Act was inapplicable in this case. (3) Whether the court below followed express Congressional policy. (4) Whether the court below correctly ruled that the Ohio court lost all jurisdiction over the property after the bankruptcy petition was filed.

## STATUTE INVOLVED.

The statute here involved is Section 67a of the Bankruptcy Act. Its pertinent provisions are set forth in the Appendix A, page 17.

## STATEMENT.

This case arises out of the bankruptcy proceedings of Lustron Corporation[2] begun on June 8, 1950, in the United States District Court for the Northern District of Illinois, Eastern Division[3] (R. 2). Lafayette Steel Company, Inc., petitioner herein, filed a petition in those bankruptcy proceedings (R. 12-18) for the modification of an *ex parte* restraining order (R. 4) which the Bankruptcy Court had issued June 8, 1950, on application of the petitioning creditors therein, against Reconstruction Finance Corporation[4] and Clyde M. Foraker, a general equity receiver[5] of all the assets of Lustron. Foraker had been appointed the receiver of Lustron by the United States District Court

2. These bankruptcy proceedings are ordinary bankruptcy proceedings which were begun by three creditors, respondents herein, who filed a petition in bankruptcy against Lustron. Lustron consented to be adjudicated a bankrupt on June 12, 1950 (R. 7), so that in effect the proceedings are voluntary bankruptcy proceedings.

3. The Illinois District Court is for convenience referred to as the "Bankruptcy Court."

4. The Reconstruction Finance Corporation is for convenience referred to as "RFC."

5. The receiver appointed by the Ohio District Court is for convenience referred to as the "Ohio receiver."

for the Southern District of Ohio, Eastern Division[6] (R. 215) in a suit instituted on February 21, 1950, in that court by RFC against Lustron for a money judgment for money loaned, for foreclosure of chattel mortgages securing the loan, and for a general equity receivership of all Lustron's assets (R. 38).

The Bankruptcy Court's restraining order pertained to a judicial sale[7] of unmortgaged property of Lustron[8] held two days before, on June 6, 1950 (R. 283) under order[9] of the Ohio court (R. 257) at which petitioner had purchased the property for $645,000 (R. 292), of which it deposited $100,000 (R. 293), but which had not been confirmed at the time the restraining order was issued. The restraining order enjoined RFC, the Ohio receiver, and all parties to the Ohio suit, but not the Ohio court, from requesting confirmation of the sale or from taking any action in connection with the sale (R. 6). The Ohio court regarded that neither the pendency of the bankruptcy proceedings nor the Bankruptcy Court's restraining order affected its power or duty to confirm the sale, and on June 12, 1950, confirmed the sale (R. 291), on a written motion which had been filed on June 6, 1950, two days before the commencement of the bankruptcy case and the issuance of the restraining order (R. 262).

6. The Ohio District Court is for convenience referred to as the "Ohio court."

7. The judicial sale by the Ohio court is for convenience referred to as the "Ohio sale."

8. This property, which is for convenience referred to as "the property," consisted of two trucks, raw steel, certain work in process and completed parts, miscellaneous production and packaging materials, certain supplies, perishable tools and certain stationery and office supplies (R. 258).

9. The order of sale specifically provided for a deposit of a certified check or cash for $100,000 by the purchaser at "the time the bid is accepted" (R. 259) and that the balance of the purchase price was to be paid within three days from the date of confirmation of the sale, and that upon failure to comply, the purchaser would be in contempt of the Ohio court (R. 260).

Even though the sale had been confirmed, the Ohio receiver refused, because of the Bankruptcy Court's restraining order, to accept the balance of the purchase money tendered by petitioner or to give petitioner the property it had purchased (R. 293). Petitioner, asserting that the title acquired by it as a *bona fide* purchaser at a judicial sale held before bankruptcy remained valid under Section 67a(3) of the Bankruptcy Act, filed its petition in the Bankruptcy Court to have the restraining order modified to the extent necessary to permit the Ohio receiver to deliver the property petitioner had purchased (R. 12-18). The Bankruptcy Court held that petitioner was not a party in interest, but merely an offeror or bidder at a judicial sale, and thus was not entitled to intervene and accordingly dismissed Lafayette's petition (R. 301). Lafayette appealed from the Bankruptcy Court's order to the Court of Appeals for the Seventh Circuit, which affirmed the order of the Bankruptcy Court (R. 327).

## REASONS FOR GRANTING THE WRIT.

The principal issue before the Bankruptcy Court and the Court of Appeals was whether petitioner was a "purchaser" at a judicial sale within the meaning of Section 67a(3) of the Bankruptcy Act and entitled to its protection. If so, then whatever title was acquired by petitioner at the Ohio judicial sale would remain valid despite the intervention of the bankruptcy proceedings against Lustron. This is a simple legal issue involving the construction of a statute. However, the opinion of the Court of Appeals gave scant consideration to Section 67a(3). In its opinion, the Court began by assuming, without making any inquiry as to the effect of Section 67a(3), that the property sold to petitioner, although sold at a judicial sale held two days before the institution of the bankruptcy proceedings remained the property of the debtor. Upon this assumption, the court applied the rule that on the filing of a petition in bankruptcy, the bankruptcy court acquires paramount and exclusive jurisdiction over all the property of the debtor. It accordingly concluded that as to the property here involved, when the petition in bankruptcy against Lustron was filed, the Ohio court "lost jurisdiction to proceed and the receiver of that court held those assets subject to the demands of the trustee in bankruptcy" (R. 323), and that the Bankruptcy "court rightfully restrained the confirmation of the sale to Lafayette, for it alone had jurisdiction thereafter to administer and dispose of the general assets of Lustron" (R. 323). This reasoning, which the Court of Appeals said, "should dispose of the case finally and completely" (R. 324), is an evasion rather than a decision of the issue involved.

1. The decision of the issues in this case necessarily requires consideration of the title and rights acquired before confirmation by petitioner as a *bona fide* purchaser at the Ohio court's judicial sale. It would seem obvious that Ohio law should determine the title and rights arising out of a judicial sale held in Ohio by a court sitting in Ohio as a court of equity, administering Ohio law in a case before it.[10]. Yet the Court of Appeals ignored applicable decisions of the Supreme Court of Ohio. It held on the authority of certain Federal court decisions[11] pertaining in the main to sales under the specific sale provisions of the Bankruptcy Act, that until confirmation the highest bidder at a judicial sale, although his bid had been accepted, does not even have an equitable title and "is not a purchaser and has no title until the sale is confirmed" (R. 324). Having reached this conclusion, and still ignoring Section 67a(3) of the Bankruptcy Act, the Court of Appeals stated: "It is of no importance that the Ohio law regarding such sales differs, if that were the fact, for, in view of the paramount character of the bankruptcy jurisdiction any disposition of general assets contrary to the provisions of the Bankruptcy Act by another court, state or federal, must fail when it infringes upon that jurisdiction" (R. 324).

The decisions of the Ohio Supreme Court as to the effect of an unconfirmed judicial sale are directly to the con-

10. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. Cf., *O'Connor* v. *Townsend*, (C. A. 8) 87 F. 2d 882.

11. The cases cited by the Court of Appeals (R. 324) all involved distinctive federal jurisdictions. They consisted of cases involving sales held under Section 70 of the Bankruptcy Act—*In re Klein's Rapid Shoe Repair Co.*, (C. A. 2) 54 F. (2d) 495; *Hartford Accident & Indemnity Co.* v. *Crow*, (C. A. 6) 83 F. (2d) 386; *In re Wolke Lead Batteries Co.*, (C. A. 6) 294 Fed. 509; *In re Realty Foundation*, (C. A. 2) 75 F. (2d) 286, 288; sales conducted in the District of Columbia—*Heller* v. *Lamar*, (C. A. D. C.) 77 F. (2d) 389; or sales in admiralty—*The East Hampton*, (C. A. 2) 48 F. (2d) 542.

trary. Thus, a purchaser at a judicial sale is regarded as a "purchaser" even before confirmation. Where, as in this case, the proceedings are legal and regular and no ground exists for setting aside the sale,[12] such purchaser has been held to be the equitable owner of the property before the sale is confirmed (*Parker* v. *Storts*, 15 Oh. St. 351, 354).[13] The risk of loss of the property after the sale and before confirmation is on the purchaser. *Jashenosky* v. *Volrath*, 59 Oh. St. 540, 53 N. E. 46. It has been held that the confirmation of the sale gives the purchaser no new right but merely confirms the right he had already acquired at the sale. *Boyd* v. *Longworth*, 11 Ohio 235, 252. The status of the purchaser as a *bona fide* purchaser is not affected by matters which came to his knowledge after the time of sale although before confirmation. *Oviatt* v. *Brown*, 14 Ohio 285.

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12. As established by the Ohio court's order of confirmation the proceedings in Ohio were legal and regular in every respect and no ground existed for setting the Ohio sale aside. The opinion of the Court of Appeals plainly recognizes that in the absence of the intervention of bankruptcy jurisdiction, petitioner had a right under Ohio law to have the sale confirmed (R. 325). In confirming the sale the Ohio court expressly found "the instructions, terms and conditions of said order of sale have been fully and completely followed" (R. 292).

13. Ohio is not alone in this view. Many other states follow the same rule and regard the purchaser as having substantial incidents of ownership prior to confirmation. *Cropper* v. *Brown*, 76 N. J. Eq. 406, 74 Atl. 987; *Knickerbocker Trust Co.* v. *Carteret Steel Co.*, 81 N. J. Eq. 130, 132, 86 Atl. 55; *Robertson* v. *M'Clintock*, 86 Ark. 255, 258, 110 S. W. 1052; *Federal Lank Bank* v. *Floyd*, 187 Ark. 616, 618, 61 S. W. (2d) 449; *George* v. *Norwood*, 77 Ark. 216, 220, 91 S. W. 557; *Brasch* v. *Mumey*, 99 Ark. 324, 138 S. W. 458; *Haralson* v. *George*, 56 Ala. 295; *Thomas* v. *Caldwell*, 136 Ala. 518, 34 So. 949; *Allen* v. *Martin*, 61 Miss. 78; *Hughes* v. *Swope*, 88 Ky. 254, 257, 1 S. W. 394; *Johnson* v. *Baker*, 246 Ky. 604, 610, 55 S. W. (2d) 404; *Marker* v. *Scotts Bluff County*, 137 Neb. 360, 366, 289 N. W. 534; *McGinnis* v. *Caldwell*, 71 W. Va. 375, 378, 76 S. E. 834. There is substantial federal authority to the same effect. *Files* v. *Brown*, (C. A. 8) 124 Fed. 133, 137; *Morrison* v. *Burnette*, (C. A. 8) 154 Fed. 617, 623; *Fidelity-Phenix Fire Ins. Co.* v. *Haywood*, (C. A. 6) 71 F. (2d) 834; 8 Cyclopedia of Federal Procedure (2d ed., 1943), Sec. 3575.

To support the conclusion it had already reached the Court of Appeals made a cursory reference to certain other Ohio decisions, which it stated were "not at variance" with its views[14] (R. 324). These cases, none of which deal specifically with the title or rights acquired under Ohio law by a *bona fide* purchaser at a judicial sale before confirmation, are completely inapplicable. At most these cases merely contain *obiter dicta* statements that a judicial sale is not "complete" until confirmation or that the rights of a purchaser fall to the ground if confirmation is properly refused. It is apparent that none of these *obiter dicta* statements is in any way inconsistent with the clear pronouncements of the Ohio Supreme Court in *Parker* v. *Storts*, 15 Oh. St. 351, 354, and the other cases here cited. Although a judicial sale is not "complete" until confirmation, it does not necessarily follow that the sale is a nullity until confirmed, so that the purchaser acquires no title or rights by the sale.[15]

This Court has clearly enunciated the consideration to be given by federal courts to state Supreme Court decisions in cases involving the application of state law. In *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 236, this Court held:

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14. The Court of Appeals cited the following Ohio cases (R. 324): *Reed* v. *Radigan*, 42 Ohio St. 292. In this case it was held that payment before confirmation of a judgment under which the sale was held was ground for setting aside the sale. The case contained a dictum that if confirmation is properly refused "the rights of the purchaser fall to the ground." *Weir* v. *Snider Saw Mill Co.*, 88 Ohio St. 424 and *Beaumont* v. *Herrick*, 24 Ohio St. 445 contain only *obiter dicta* statements that a sale is not "complete" until it is confirmed. *Howell* v. *French*, 74 O. App. 257 is an intermediate court decision which is completely inapplicable. *Walters* v. *Homberg*, 3 O. App. 326 distinctly supports petitioner's position and relies heavily upon the decisions cited by petitioner.

15. *Cropper* v. *Brown*, 76 N. J. Eq. 406, 412, 74 Atl. 987; *Robertson* v. *McClintock*, 86 Ark. 255, 258, 110 S. W. 1052; *Hughes* v. *Swope*, 88 Ky. 254, 257, 1 S. W. 394.

> "True, as was intimated in the *Erie R. Co.* case, the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted."

The inconclusive *obiter dicta* of the Ohio cases cited by the Court of Appeals can hardly be regarded as "clear and persuasive" indications by the Supreme Court of Ohio that its pronouncements in *Parker* v. *Storts,* 15 Oh. St. 351, 354, and the other Ohio Supreme Court decisions cited by petitioner are to be modified, limited or restricted. Yet in this case the Court of Appeals, despite its relative unfamiliarity and lack of experience with the law of Ohio, which is outside its circuit, had not the slightest hesitation in disregarding clear decisions of the Ohio Supreme Court.

The questions presented by this case, are of importance not only in resolving conflicts between trustees in bankruptcy and strangers to the bankruptcy proceedings asserting rights acquired under state law, which are of common occurrence in the administration of the Bankruptcy Act, but also in implementing the policy of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 and the Rules of Decision Act (28 U. S. C., 1948 rev., sec. 1652) to achieve conformity between Federal court decisions and State court decisions on matters of state law. These issues are especially highlighted in this case, where the territorial jurisdiction of neither the trial court nor of the appellate court includes the state whose law is involved.[16]

2. The principal issue in this case is whether Section 67a(3) of the Bankruptcy Act is applicable so as to allow

16. Cf., *Spiegel's Estate* v. *Comm.,* 335 U. S. 701, 708; *Helvering* v. *Stuart,* 317 U. S. 154, 162-165; *Steele* v. *General Mills,* 329 U. S. 433, where familiarity by a Court of Appeals with the State law involved was stressed as being an important consideration on review by this court.

to remain valid, despite the intervention of bankruptcy, whatever title and rights were acquired by petitioner at the Ohio court's judicial sale. Near the end of its opinion the Court of Appeals for the first time referred to Section 67a(3) and quickly disposed of it by holding it was not applicable, saying: "The short answer is • • • that the Ohio receiver's sale was not in pursuance of any lien but a sale of general assets" (R. 325).

Prior to the instant case it had long been settled law under the undeviating decisions of the same Court of Appeals, as well as of this Court, other federal courts of appeals, and the Supreme Court of Ohio, that a general equity receivership was the levy of an equitable execution upon all assets coming into the receiver's possession and fastened a judicial lien upon those assets within the meaning of Section 67a(3) of the Bankruptcy Act.[17] The Court of Appeals here specifically recognized that the Ohio court's judicial sale was "pursuant to the Court's administration of the general assets of the bankrupt" (R. 326). Had it followed the rule that a general equity receivership imposed a judicial lien, it could not have concluded that the sale in this case was not in pursuance of any lien. Its holding in this case is in direct conflict with all the prior decisions on this point, and casts doubt upon what until now had been established law.

The determination of this question is of great importance in the administration of the Bankruptcy Act, especially in avoiding and resolving unseemly conflicts of jurisdiction

17. *Doyle, Receiver* v. *Yoho Hooker Youngstown Co.*, 130 Oh. St. 400, 200 N. E. 123, 125, 126; *Cheney* v. *Maumee Cycle Co.*, 64 Oh. St. 205, 60 N. E. 207, 210; *Ex parte Tyler*, 149 U. S. 164, 183; *Blair* v. *Brailey*, (C. A. 5) 221 Fed. 1, 3; *Clements* v. *Conyers*, (C. A. 7) 32 F. (2d) 5, 6; *Atlanta Flooring & Insulation Co.* v. *Russell*, (C. A. 5) 146 F. (2d) 884, 886; *In re Bartlett Oil & Gas Corp.*, (N. D. Okla.) 44 F. (2d) 616, 620; *Park Lane Dresses* v. *Houghton & Dutton Co.*, (C. A. 1) 54 F. (2d) 33, 37; *Armour Fertilizer Works* v. *Sanders*, (C. A. 5) 63 F. (2d) 902, 904.

between courts of bankruptcy and non-bankruptcy courts which can only serve to undermine public confidence in our judicial system.

3. The question of the jurisdiction of the Ohio court to confirm, after bankruptcy proceedings have begun, a judicial sale of property of the debtor held before the commencement of the bankruptcy proceedings, has never been passed on before the instant case.[18]

If Ohio law is followed in this case, then when bankruptcy intervened, petitioner was the equitable owner of and had equitable title to the property it had purchased at the Ohio judicial sale even though the sale had not then been confirmed. Section 67a(3) of the Bankruptcy Act expressly declares that such a title shall remain valid despite the operation of the Bankruptcy Act. Confirmation of the judicial sale by the Ohio court amounts to no more than the formal recognition of petitioner's already existing equitable title. In view of Section 67a(**3**) such confirmation, although occurring after the bankruptcy proceedings began would seem to be merely an assertion of jurisdiction "not inconsistent with the provisions of the Bankruptcy Act", which this Court sanctioned in *Callaway* v. *Benton,* 336 U. S. 132, 151 and not a "disposition of general assets contrary to the provisions of the Bankruptcy Act" as the court below held it to be (R. 324).

This question of the effect of Section 67a(3) of the Bankruptcy Act on the jurisdiction of non-bankruptcy courts after the intervention of bankruptcy is one of fundamental importance in the administration of the Bankruptcy Act.

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18. In *Jones* v. *Springer*, 226 U. S. 148, this Court sustained a judicial sale by a non-bankruptcy court which was both held and confirmed after bankruptcy proceedings had been started against the debtor. However, in that case this Court expressly avoided any consideration of Section 67 of the Bankruptcy Act, but based its decision on another ground, the necessity of the sale because the property was in danger of destruction. *Cf., Fischer* v. *Pauline Oil & Gas Corp.,* 309 U. S. 294.

4. Since bankruptcy commonly follows in the wake of a judicial sale, the question of the scope of Section 67a(3) of the Bankruptcy Act presented by this case is one of fundamental importance in the administration of the Bankruptcy Act. The decision of this question will have far reaching consequences in encouraging or discouraging bidders at judicial sales in nonbankruptcy proceedings.

In its Report recommending the enactment of Section 67a(3) in its present amended form along with the other Chandler Act amendments to the Bankruptcy Act, the Committee of the Judiciary of the House of Representatives stated the purpose of Sec. 67a(3) as follows: "This exception is deemed to be necessary and in the interest of protecting judicial sales" (H. Rep. No. 1409, 75th Cong., 1st Sess., 1937, p. 33). Congress gave express statutory recognition to a fundamental policy of the common law since time immemorial[19] of protecting the stability of judicial sales so as to encourage persons to bid at such sales and enacted this policy into Section 67a(3) to protect *bona fide* purchasers at judicial sales against the intervention of bankruptcy. The decisions of this Court also recognize that *bona fide* purchasers of property are to be protected should bankruptcy proceedings intervene. *Fischer* v. *Pauline Oil & Gas Co.*, 309 U. S. 294, 302; *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U. S. 426, 429. Although in such cases the purchaser retains the property, the bankrupt estate obtains the proceeds of the sale in lieu of the property. *Clarke* v. *Larremore*, 188 U. S. 486.

Had the judicial sale in this case been confirmed by the Ohio court an instant before the bankruptcy proceedings against Lustron were filed, there could have been no question that Section 67a(3) would apply and that petitioner

19. *Mathew Manning's Case*, 8 Coke 94(b), 77 Eng. Rep. 618, decided in 1609 by Lord Chief Justice Coke, shows the policy to be fundamental and long established in our legal system.

would be protected in its purchase. In this case the purchaser was denied the protection of Section 67a(3) because bankruptcy intervened before the sale was confirmed. As far as the policy of protecting the stability of judicial sales so as to encourage bidders at such sales is concerned, it should make no difference whatever whether bankruptcy intervenes before or after the confirmation. A prospective purchaser bidding at a judicial sale has no way of foretelling whether bankruptcy proceedings will be filed against the debtor and, if filed, whether they will be filed before or after confirmation of the sale. If such a purchaser, though entitled to confirmation must lose his title and rights to the property should bankruptcy intervene before the sale is confirmed then no purchaser can bid at any judicial sale with any certainty of obtaining the property. No purchaser would be willing to bid and have his money tied up unless he could buy the property cheaply enough to compensate him for the risk.

The risk and doubt engendered by the Court of Appeal's decision will necessarily infect every non-bankruptcy judicial sale. Such sales will become nothing more than sacrifice sales. As aptly stated by Mr. Justice Holmes in *Jones* v. *Springer*, 226 U. S. 148, 156, if "the purchaser is chargeable with notice that there may be somewhere a petition filed that will destroy his title, the doubt affects the price that he will give, and if the sale turns out to be effective, the goods have been sacrificed."

The decision of this question is a matter of great economic as well as legal importance, affecting every prospective bidder at a judicial sale and should be authoritatively settled by this Court.

## Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX A.

Act of June 22, 1938, c. 575, 52 Stat. 840:

"Sec. 67 (Title 11, U. S. C., sec. 107). LIENS AND FRAUDULENT TRANSFERS.

"a.(1) Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition in bankruptcy * * * by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent or (b) if such lien was sought and permitted in fraud of the provisions of this Act: * * *

* * * * *

"(3) The property affected by any lien deemed null and void under the provisions of paragraphs (1) and (2) of this subdivision a shall be discharged from such lien, and such property * * * shall pass to the trustee or debtor, as the case may be * * * *Provided, however,* That the title of a bona-fide purchaser of such property shall be valid, but if such title is acquired otherwise than at a judicial sale held to enforce such lien, it shall be valid only to the extent of the present consideration paid for such property."

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1950.

## No. 472

IN THE MATTER OF
LUSTRON CORPORATION,
BANKRUPT.

LAFAYETTE STEEL CO., INC.,
*Petitioner,*

*vs.*

LUSTRON CORPORATION, ET AL.,
*Respondents.*

## REPLY OF PETITIONER TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

## AMENDMENT TO PETITION FOR WRIT OF CERTIORARI.

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---

## REPLY OF PETITIONER TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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### STATEMENT.

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At various points in their answer Respondents allude to the proceeding in the Ohio court begun by RFC as "a general equity insolvency proceeding" (answer, p. 2) or as an "insolvency proceeding" (answer, p. 9). The Ohio proceeding was simply an action to enforce mortgage liens in which the RFC requested and obtained the appointment of a receiver for the mortgaged property and the extension of the receivership to all the debtor's property (R. 38). The Ohio proceeding was in no sense an insolvency proceeding under any insolvency or bankruptcy statute.

## ARGUMENT.

Respondents' Answer asserts that the writ of certiorari should not be granted in this cause because the question involved "has been settled by this Court, and the conclusion of the Court of Appeals is based on the prior applicable decisions of this Court" (answer, p. 6). Yet Respondents' own arguments on the merits of the legal issues in this case, to which the major part of their answer is devoted, demonstrate that this case involves important, unsettled issues of a fundamental character which should be settled by a decision of this Court.

1. Thus Respondents endeavor to answer Petitioner's contention that Ohio law applies to determine the title and property rights of Petitioner arising out of the judicial sale in question by urging in this Court for the first time[1] that Ohio law does not apply because the sale is governed by a federal statute, Title 28 U. S. C., § 2004. The question of what law, whether state law or another body of law, governs the effect of a federal equity court sale, and the question of what is the specific rule of law applicable, if state law does not apply, which are implicit in determining what title and interest are acquired before confirmation by a purchaser at the sale, are questions of basic importance in the administration of the Federal judicial system.

Title 28 U. S. C., § 2004 contains but the barest of procedural provisions as to judicial sales of personal property. It provides merely that any personalty sold under any order or decree of any court of the United States shall be sold in accordance with § 2001 unless the Court orders

1. Respondents did not either in the Court of Appeals or in the Bankruptcy Court contend that § 2004 of Title 28, U. S. C. applied. Respondents at the hearing in the Court of Appeals conceded that Ohio law applied.

otherwise. § 2001 provides merely that real estate sold under the order of a federal court shall be sold at public sale held at one of certain located court houses or on the premises, and in addition permits a federal court to order a private sale of real estate on compliance with certain procedural provisions. § 2004 thus contains nothing which either expressly or impliedly determines or affects the title and interest which a purchaser acquires or a debtor loses under a federal court's judicial sale of personal property. Its very narrow procedural provision does not exclude the application of state law in determining this issue.

On the other hand, there are definite indications that, notwithstanding § 2004, state law may well be applicable in determining what is the title and interest a purchaser acquires at a federal court sale. Despite the enactment since 1893 of the Federal Judicial Sales Act (of which § § 2001 and 2004, Title 28 U. S. C., formerly § § 846 and 847, are a part), there has been no weakening or change in the doctrine established by this court in *Brine* v. *Hartford Fire Ins. Co.*, 96 U. S. 627, 635 (1878), sixty years before *Erie Ry. Co.* v. *Tompkins*, 304 U. S. 64 (1938), that in order to avoid introducing into the jurisprudence of a state "the discordant elements of a substantial right which is protected in one set of courts and denied in the other with no superior to decide which is right" the effect of a federal court judicial sale on the rights acquired by the purchaser is subject to state rules of property. *American Mine Equipment Co.* v. *Ill. Coal Corp.*, (C. A. 7) 31 F. (2d) 507; *O'Connor* v. *Townsend*, (C. A. 8) 87 F. (2d) 882. Of course, this doctrine has had even greater vitality since this court's decision in *Erie Ry. Co.* v. *Tompkins, supra.*

The policy considerations stressed in *Erie Ry. Co.* v. *Tompkins* are especially involved here. The rule of law in many states is that the purchaser of property at a judicial sale is the equitable owner of the property even before the

sale is confirmed, although his title may be defeated if confirmation should properly be denied.[2] If Respondents' contentions as to § 2004 of the Judicial Code are sustained, then on exactly the same facts involving a judicial sale of property in a state following such rule, where the sale had not been confirmed when bankruptcy intervened, there will be diametrically opposite results as to the debtor's rights to the property, depending on whether it was a federal court or a state court which ordered the sale. Thus, if the sale were ordered by a federal court, the debtor's trustee in bankruptcy would be entitled to the property; whereas if the sale were ordered by a state court, the purchaser at the sale, subject to confirmation, would be entitled to the property. This Court should decide whether anything in § 2004 requires such an untoward result.

Moreover, even if it be assumed that the existence of § 2004 of the Judicial Code necessarily excludes the application of state law in determining what is the title and interest a purchaser acquires before confirmation at a federal court judicial sale, it does not follow that the specific rule of law to govern is the one adopted by the Court of Appeals in this case. The authorities on this question are irreconcilably divided. There are federal cases, principally on sales under the specific sales provisions of the Bankruptcy Act, which support the decision of the court below. But as shown in the Petition (p. 9), there are also a very substantial number of state and federal decisions to the contrary, which hold that a purchaser at a judicial sale acquires an equitable title immediately at the sale, although the sale is not complete until confirmed and the purchaser may lose his title should the sale not be confirmed. There is no decision of this court which is decisive of the question. In view of the importance of the question in the operation of the bankruptcy act and in the administration of the

2. Many of the authorities are referred to in footnote 13, p. 9 of the Petition in this case.

federal judicial system, this court should resolve the conflict in the authorities and decide which rule shall be followed by the federal courts.

2. Respondents' claim (answer, pp. 10-15) that the Ohio rule as to the title and rights acquired before confirmation by a purchaser at a judicial sale is the same as the rule expressed in the federal cases cited by the court below, which for the greater part involve sales under the sales section of the bankruptcy act. The Ohio authorities cited by Respondents in the main are the same as those cited in the opinion of the Court of Appeals in this case. As was pointed out in the Petition in this case, (p. 10) none of the Ohio cases cited by the Court of Appeals dealt specifically with the title or rights acquired before confirmation by a purchaser at a judicial sale and the *obiter dicta* in those cases, to the effect that the sale is not complete until confirmed or that the purchaser loses his rights if confirmation should be denied, are in no way inconsistent with the principle that the purchaser at such a sale acquires an equitable title before confirmation. There is not a single Ohio case, and certainly Respondents cite none, which states even by way of *dictum* that the Ohio law is what Respondents claim: that prior to confirmation the purchaser is merely "a preferred proposer and not the purchaser."[3]

3. The only authority Respondents cite to support this contention is 24 Ohio Jurisprudence, Judicial Sales, § 105, p. 79. This encyclopedia does not cite a single Ohio decision in support of this proposition, but cites only another encyclopedia published by the same publisher, 16 Ruling Case Law, p. 114, § 82. Ruling Case Law, also, fails to cite a single Ohio decision to support its statement of this proposition. However Ruling Case Law qualifies its statement of the proposition to show that the generally accepted law is to the contrary of what Respondents urge and that even before confirmation of a judicial sale "the highest bidder to whom the property has been struck off and who has paid his deposit in good faith acquires an equitable and inchoate title; and this is a vested and definite legal right which is recognized and enforced by law, and must be respected by the court * * *"

In cases involving the risk of loss where property is lost or damaged, the risk of loss is placed on the "owner." In such cases where the property is lost or damaged after a judicial sale is held but before the sale is confirmed, it makes a real difference whether the purchaser is the equitable owner of the property or is merely a "preferred proposer" without any title or rights to the property. These cases really test whether the rule of law is the one way or the other. In such a case, the federal decisions involving sales under the bankruptcy act sales provision upon which the Court below relied and which Respondents claim do not differ from the Ohio law, place the risk of loss not on the purchaser but on the receiver or trustee conducting the sale, *Hartford Accident & Indemnity Co.* v. *Crow,* (C. A. 6) 83 F. (2d) 386, 387. The Ohio decisions, however, indicate that the risk of loss is on the purchaser. *Murphy* v. *Hardee,* 22 Oh. C. C. 511, 517; *Schmidt* v. *Penn Mutual Life Ins. Co.,* 25 Oh. L. A. 652, 655. These Ohio cases demonstrate that regardless of what language or *dictum* may be found in the Ohio decisions, in situations where it really makes a difference, the Ohio courts regard a purchaser at a judicial sale as the equitable owner of the property purchased even before the sale is confirmed. *Johnson* v. *Cincinnati,* 11 Oh. C. C. (N. S.) 344, 346, an Ohio Circuit Court case from which Respondents quote (answer, p. 14), if it stands for anything, demonstrates that where it is necessary to protect the purchaser at a judicial sale the Ohio courts will consider him as the equitable owner before confirmation although they may not do so where the protection of his rights is not involved.

Respondents assert *Oviatt* v. *Brown,* 14 Oh. 285 and *Boyd* v. *Longworth,* 11 Oh. 235, cited in the Petition (p. 9) are inapplicable because they "involve a sheriff's sale which by the Ohio statute relating to sheriff's sales vested title in the purchaser at the date of sale" whereas the instant

case involves "a judicial sale by a receiver * * * subject to confirmation." It is true that these cases involve sheriff's sales. But Respondents overlook what those cases show plainly: (1) the sheriff's sales in those cases, like judicial sales, were subject to confirmation by the court which entered the judgment; and (2) under the statute governing the sheriff's sales, full title was not vested in the purchaser "at the date of sale" but the sheriff's deed when executed after confirmation, like the deed in connection with a judicial sale, vested in the purchaser "the title from the date of the sale. The deed executed at a subsequent date has relation back to that date and is as effectual as if then made." *Oviatt* v. *Brown,* 14 Oh. 285, 294.[4] The decisions of the Ohio Supreme Court in *Oviatt* v. *Brown* and *Boyd* v. *Longworth,* are thus equally as applicable to judicial sales as to sheriff's sales, and establish the title and property interest which a purchaser at a judicial sale acquires under Ohio law before the sale is confirmed.

Respondents rely strongly on *Hoyd* v. *Citizens Bank of Albany Co.* (C. A. 6) 89 F. (2d) 105, 108 as supporting their contention as to the Ohio rule. In that case an agricultural composition or extension proceeding under §§ 75 (a) to (n) of the Bankruptcy Act had been filed after the real estate of the debtor, located in Ohio, had been sold under an Ohio State court's decree of foreclosure. The sale had not been confirmed when the bankruptcy proceeding was filed. The court there held that the debtor's statutory right under § 11690, General Code of Ohio, to redeem from the foreclosure sale at any time before its confirmation "constituted property which was subject to the jurisdiction of the federal court under § 75(n)". This decision

4. Compare *Jashenosky* v. *Volrath,* 59 Oh. St. 540, 545, which enunciates the same rule of relation back with respect to deeds executed under judicial sales.

was based entirely upon the debtor's statutory right to redeem from a sale of real estate, granted by the Ohio statute, and not, as Respondents claim, upon any hypothesis that under Ohio law a purchaser of property at a judicial sale has no title or rights as to the property before the sale is confirmed. The Ohio statute expressly limits the right of redemption to sales of "real estate" and there is, under Ohio law, no right of redemption from a judicial sale of personal property,[5] which is all that the instant case involves. The *Hoyd* case is thus inapplicable and gives no support to Respondents' contention.

In all, Respondents have failed to discredit or weaken the pronouncement of the Supreme Court of Ohio in *Parker* v. *Storts*, 15 Oh. St. 351, 354, referred to in the Petition, that a purchaser at a judicial sale where, as in the instant case, "the proceedings are legal and regular, and no ground exists for setting aside the sale, becomes, by his purchase, and by the payment of the purchase money or compliance with the terms of sale, the equitable owner of the premises; and though he may not be invested with the legal title till the confirmation of the sale, and the execution of a conveyance by the proper officer; yet, when the legal title is thus vested, for many purposes it relates back to the day of sale." This statement still expresses the Ohio law on this point.

The proper determination of the Ohio law in this case is not a simple matter, but requires substantial familiarity with Ohio law and practice as well as the careful weighing and analysis of the decisions of the Ohio courts. Ohio is outside the circuit of the Court below, and its experience with Ohio law is therefore relatively limited. Its decision denying that Petitioner acquired any title or rights under Ohio law is in direct conflict with the order on the same

5. 24 Ohio Jurisprudence, Judicial Sales, § 141, p. 104.

matter of the United States Court for the Southern District of Ohio, a court which daily passes on matters involving Ohio law, and which recognized and confirmed the title and rights petitioner had acquired at the judicial sale.[6] The instant case is thus of especial importance in implementing the policy of *Erie Ry. Co.* v. *Tompkins,* 304 U. S. 64 and the Rules of Decision Act (28 U. S. C., § 1652) and merits review by this Court.

3. Respondents contend (Answer p. 15) that the argument of petitioner that the appointment of the Ohio receiver was the levy of an equitable execution which imposed a judicial lien upon all assets coming into the Ohio receiver's possession, is not material or relevant, and their answer does not discuss this point. However, regardless of Respondents' present views, the court below based its decision that § 67a(3) of the Bankruptcy Act was not applicable to protect petitioner entirely on its conclusion that "the Ohio receiver's sale was not in pursuance of any lien but a sale of general assets." (R. 325). As pointed out in the Petition (p. 12), this holding is contrary to numerous long standing decisions of almost every Court of Appeals, including the Court below and casts doubt and confusion upon what until now had been established law.

4. Respondents rely strongly, as did the Court of Appeals below, upon the rule of bankruptcy law expressed in *Taylor* v. *Sternberg,* 293 U. S. 470; *Isaacs* v. *Hobbs Tie & Timber Co.,* 282 U. S. 734 and other cases, that upon the

6. The situation presented in this case of a federal court relatively unfamiliar with Ohio law deciding a question of Ohio law contrary to the conclusion in the same matter of a federal court in Ohio, and the submission of a question of Ohio law to this Court for review without the aid of the opinions of lower courts familiar with Ohio law, is a graphic illustration of the serious complications resulting from the denial below of the RFC's motion to transfer the bankruptcy proceedings to the Ohio federal court. Review of the denial of that motion is sought in this court by the RFC in Case No. 507, this term, *RFC* v. *Lustron Corp.*

filing of a petition in bankruptcy, the bankruptcy court acquires paramount and exclusive jurisdiction over all the property of the debtor. Their contention is that since the superior jurisdiction of bankruptcy had intervened before confirmation of the sale to petitioner, the Ohio court lost jurisdiction and had no power to confirm the sale, and therefore petitioner acquired no title or rights to the property purchased.

This contention assumes that without confirmation by the Ohio court, petitioner could have no title of any kind or any right to the property. The assumption is fallacious. By reason of the judicial sale and even before its confirmation, when bankruptcy intervened petitioner had substantial rights and obligations as to the property and under Ohio law was the equitable owner of and had an equitable title to the property. Moreover, Respondents' contention completely disregards § 67a(3) of the Bankruptcy Act. Supposing the paramount and exclusive jurisdiction of the bankruptcy court which Respondents contend attached when the bankruptcy petition was filed against Lustron, nevertheless at that time petitioner already had an equitable title to the property. Whatever that title consisted of, it was expressly declared valid by § 67a(3) of the Bankruptcy Act. Nothing in the rules as the exclusive and paramount jurisdiction of bankruptcy courts takes away from third persons, strangers to the legal proceedings, existing property rights expressly declared valid by a specific provision of the Bankruptcy Act.

Confirmation by the Ohio court, to use apt words of the Ohio Supreme Court, gave petitioner "no new right. It merely confirmed the right acquired at the sale." *Boyd* v. *Longworth,* 11 Oh. 235, 252. The action of the Ohio court formally recognizing the equitable title and the rights petitioner had acquired at the sale thus gave petitioner nothing

it did not already have when bankruptcy intervened. Such action although occurring after bankruptcy intervened, is, as pointed out in the Petition (p. 13), no more than an exercise of jurisdiction "not inconsistent with the provisions of the Bankruptcy Act" which this court sanctions. *Callaway* v. *Benton,* 336 U. S. 132, 151. In view of § 67a(3) of the Bankruptcy Act, if the Ohio court had not confirmed the sale, it would seem that petitioner in the enforcement of its property rights would be entitled to have the Bankruptcy Court enter an order permitting the Ohio court to proceed with the matter of confirmation and enter an appropriate order as was done in *Jelks* v. *Aetna Life Ins. Co.* (C. A. 10) 134 F. (2d) 870. That case involved a judicial sale governed by Oklahoma law, which is like that of Ohio, the purchaser at a judicial sale obtaining an equitable title even before confirmation.

In attempting to distinguish *Jelks* v. *Aetna Life Ins. Co., supra,* Respondents have distinguished away their own case. Although in the *Jelks* case at the time the proceedings under § 75 of the Bankruptcy Act were begun the debtor under state law had no equity of redemption in the property sold at the judicial sale, nevertheless, the sale had not been confirmed when the bankruptcy proceedings were started. In that case the bankruptcy court granted the state court permission to proceed with the confirmation and then after the state court confirmed the sale, dismissed the bankruptcy proceeding. On appeal the Court of Appeals sustained this action, pointing out with respect to the lack of confirmation when bankruptcy was started, that under Oklahoma law by virtue of the sale "the equitable title passes to the purchaser; and the confirmation relates back to the date of the sale." In the instant case, as has been shown, there is, under Ohio law, no right of redemption from a judicial sale of personal property and, the Ohio law as to the title acquired by the

purchaser at a judicial sale is like that of Oklahoma. Yet Respondents concede that the *Jelks* case "does not in any way infringe" upon the rules as to the paramount and exclusive nature of bankruptcy jurisdiction upon which they rely.

These questions as to the effect of the rules as to the paramount and exclusive character of bankruptcy jurisdiction and the power of the Ohio court to confirm its judicial sale, after bankruptcy had intervened, as to none of which there is any direct authority, are of basic importance in the administration of the Bankruptcy Act and warrant review by this court.

**Conclusion.**

For the reasons set forth in the Petition and this Reply, it is respectfully submitted that the petition of Lafayette Steel Co., Inc., for a writ of certiorari should be granted.

Respectfully submitted,

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## AMENDMENT TO PETITION FOR WRIT OF CERTIORARI.

---

In accordance with the notice of its intention to amend the petition in this case given Respondents by letter of January 9, 1951, Petitioner amends its petition in the following respects:

1. To be inserted after the word "confirmed" in the sixth line on page 9 of the Petition for a Writ of Certiorari:

> and when the sale is confirmed and a conveyance executed, these relate back to the date of sale, vesting legal title also in the purchaser as of that date.

2. To be inserted after the first full paragraph on page 13 of the Petition for a Writ of Certiorari:

> In the analogous situation of an agricultural composition or extension proceeding under Section 75 of the Bankruptcy Act begun after a judicial sale of property of the debtor, it has been held that state law is determinative of the effect of the judicial sale, *State Bank of Hardinsburg* v. *Brown,* 317 U. S. 135. And in such a case where the state law, like that of Ohio, is that the purchaser by reason of the judicial sale becomes the equitable owner of the property sold even before the sale is confirmed, it is held that the Bankruptcy Court acquires no jurisdiction over the property sold at a judicial sale held before but not confirmed until after the Section 75 proceedings were begun. *Jelks* v. *Aetna Life Ins. Co.* (C. A. 10), 134 F. (2d) 870.

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## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

### OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 184 F. (2d) 798. The opinion is also printed in full in the record (R. 321-326).

## JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered October 23, 1950 (R. 327). Petition for rehearing was denied November 10, 1950 (R. 328). The petition for a writ of certiorari was filed on December 29, 1950. The jurisdiction of this court is invoked by petitioner under Title 28, U. S. C., section 1254(1).

## QUESTION PRESENTED.

Whether a non-bankruptcy court, in a general equity insolvency proceeding instituted within four months prior to the filing of a bankruptcy proceeding against the insolvent, has the power, after supervening bankruptcy and with knowledge thereof, to continue to administer and dispose of unencumbered assets of the bankrupt by confirming a sale of such assets theretofore held.

## STATEMENT OF THE CASE.

The respondents deem it advisable to make a restatement of the case because the statement of the petitioner is incomplete.

On February 21, 1950, Reconstruction Finance Corporation filed its complaint against Lustron Corporation in the United States District Court for the Southern District of Ohio, Eastern Division,[1] seeking first, to obtain a money judgment against Lustron, second, to foreclose certain chattel mortgages and third, to place Lustron under a general equity receivership because it was insolvent (R. 59, 60). On March 6, 1950, the Ohio court appointed a receiver[2] of Lustron and of all of its property, assets and rights (R. 216) and restrained all creditors of Lustron from taking any action against Lustron (R. 218). On May 15, 1950, the Ohio Court ordered its receiver to sell on June 6, 1950, at public auction, unencumbered personal property of Lustron. The order provided that the sale was subject to confirmation by the Ohio Court (R. 257). The petitioner was the highest bidder at the auction. On the day the auction was held the Ohio receiver filed a motion for an order confirming the sale (R. 262).

Two days later, on June 8, 1950, which was within four months after the institution of the general equity receivership in the Ohio Court and prior to that court's confirmation of its receiver's sale, an involuntary petition in bankruptcy against Lustron was filed in the United States District Court for the Northern District of Illinois, East-

1. The United States District Court for the Southern District of Ohio, Eastern Division is, for convenience, referred to as the "Ohio Court."

2. The receiver appointed by the Ohio Court is, for convenience, referred to as the "Ohio receiver."

ern Division[3] (R. 2). On the same day, June 8, 1950, the Bankruptcy Court entered its restraining order enjoining the Ohio receiver and the parties to the Ohio proceeding from proceeding to have the sale confirmed (R. 6).

On June 9, 1950, the Ohio Court was informed of the restraining order (R. 143) and the attorneys for the Ohio receiver were served with a copy of it (R. 15). On June 12, 1950, the Ohio Court, disregarding the restraining order and the pendency of the bankruptcy proceeding, entered an order purporting to confirm its receiver's sale (R. 291). However, the receiver refused to transfer "title, possession or custody" of the property (R. 293, 294) in view of the Bankruptcy Court's restraining order.

Thereafter, on June 27, 1950, the petitioner filed its petition in the Bankruptcy Court requesting modification of the restraining order to permit the Ohio receiver to issue instruments of conveyance and deliver possession of the property (R. 12-18). The Bankruptcy Court on July 6, 1950, held that petitioner was, prior to confirmation, merely an offerer or bidder at the Ohio receiver's sale, and dismissed its petition and denied its motion for leave to intervene for the purpose of modifying the restraining order (R. 302, 302-A). The Court of Appeals for the Seventh Circuit affirmed the order of the Bankruptcy Court (R. 327).

3. The United States District Court for the Northern District of Illinois, Eastern Division, is, for convenience, referred to as the "Bankruptcy Court."

## SUMMARY OF ARGUMENT.

I. The case is not within the purview of Rule 38.5 of this Court.

II. The petition should be denied for failure to comply with Rules 38.2 and 27 of this Court.

III. A non-bankruptcy court does not have the power, after the supervention of bankruptcy and with knowledge thereof, to confirm a sale of unencumbered assets of the bankrupt ordered in a general equity receivership instituted within four months prior to the filing of the petition in bankruptcy.

IV. The proviso of section 67a (3) of the Bankruptcy Act affords the petitioner no relief, since the petitioner, as the highest bidder at a judicial sale subject to confirmation, had not acquired the title of a bona fide purchaser.

V. The decision of the Court of Appeals is not contrary to any policy concerning the stability of judicial sales.

## ARGUMENT.

### I.

### The Case Is Not Within the Purview of Rule 38.5 of This Court.

A review on writ of certiorari under Rule 38.5 is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. Such reasons are not presented in this case.

Petitioner attempts to come within the purview of Rule 38.5(b) by urging that the Court of Appeals has decided an important question of Ohio law in conflict with Ohio decisions and an important question of federal law not settled by this Court.

The Ohio law does not apply, for the sale in question is governed by the provisions of Title 28 U. S. C. sec. 2004. Moreover, the Ohio law with respect to judicial sales is in accord with the decision of the Court of Appeals in this case and the decisions generally of other Federal Courts on the subject.

The Court of Appeals decided the issue in this case squarely in accordance with the doctrines laid down in *Taylor* v. *Sternberg*, 293 U. S. 470, *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734 and *In re Diamond's Estate*, 259 F. 70 (C. A.—6). Petitioner does not even mention these and related cases in its petition, although the Court of Appeals, after discussing these cases, said, "what we have said should dispose of the case finally and completely" (R. 324).

The question here involved, therefore, has been settled

by this Court, and the conclusion of the Court of Appeals is based on the prior applicable decisions of this Court and is not a departure from the accepted and usual course of judicial proceedings in bankruptcy.

The writ of certiorari will not be granted merely to afford a review of the application of settled principles of law where the propriety of the application is dependent upon the facts peculiar to the particular case.

This case does not require the exercise of supervision by this Court, and it is, therefore, submitted that the petition for a writ of certiorari should be denied.

## II.

### The Petition Should Be Denied for Failure to Comply With Rules 38.2 and 27 of This Court.

Rule 38.2 provides that "a supporting brief may be annexed to the petition or presented separately, but it must be direct and concise (See Rules 26 and 27). A failure to comply with these requirements will be a sufficient reason for denying the petition." Rule 27 provides for the contents and order of the brief. Petitioner, in violation of Rule 38.2, has attempted to support its petition with a brief and argument which are not annexed to the petition nor presented separately but are inextricably interwoven in its petition. The "Reasons for Granting the Writ," appearing on pages 7 through 15 of the petition, are an admixture of reasons, points, authorities, footnotes and argument, most of which is the proper subject matter of a supporting brief rather than a petition.

The petition merits denial for violation of Rules 38.2 and 27.

## III.

**A Non-Bankruptcy Court Does Not Have the Power, After the Supervention of Bankruptcy and With Knowledge Thereof, to Confirm a Sale of Unencumbered Assets of the Bankrupt Ordered in a General Equity Receivership Instituted Within Four Months Prior to the Filing of the Petition in Bankruptcy.**

It is settled law that where, as in this case, the property of the bankrupt is in the hands of a receiver appointed in a general insolvency proceeding instituted within four months prior to bankruptcy, the Bankruptcy Court has paramount and exclusive jurisdiction over the property in the receiver's possession.

This fundamental rule in bankruptcy is expressed by this court in *Taylor* v. *Sternberg,* 293 U. S. 470, at p. 472:

> "Upon such filing (*petition in bankruptcy*), the jurisdiction of the bankruptcy court becomes paramount and exclusive; and thereafter that court's possession and control of the estate cannot be affected by proceedings in other courts, whether state or federal. (Citing cases.) This applies while the possession is constructive as well as when it becomes actual. (Citing cases.) * * *
>
> "In the present case, with the supervening bankruptcy, the possession of the state court came to an end, and that of the bankruptcy court immediately attached."

This pronouncement is in accord with the provisions of Section 69d of the Bankruptcy Act (Title 11, U. S. C. sec. 109d) which provides in pertinent part as follows:

> "* * * Such receiver or trustee, with knowledge of the bankruptcy proceeding, shall make no disbursements or take any action in the administration of the property in his charge without first obtaining authorization therefor from the bankruptcy court."

Petitioner has not cited any contrary authority.

The exclusive and paramount control of the Bankruptcy Court over the assets here involved is not affected by the Ohio receiver's possession, since the Ohio insolvency proceeding was not in the enforcement of liens antedating bankruptcy by more than four months. Under such circumstances the Ohio receiver's possession is not adverse to the Bankruptcy Court and the constructive possession of the property is in the Bankruptcy Court since the date of the filing of the petition in bankruptcy.[4]

The entry of the order of confirmation was not a ministerial act but involved the exercise of discretion by the Ohio Court[5] and such order was an attempt by that court to administer, and, in fact, to dispose of the bankruptcy estate in derogation of the exclusive and paramount jurisdiction of the Bankruptcy Court. Such action by the Ohio Court was an attempt to transfer the title of the trustees in bankruptcy to the property involved, which had vested in the trustees as of the date of the filing of the petition in bankruptcy pursuant to the provisions of Section 70a (5) of the Bankruptcy Act (Appendix p. 17).

The order of confirmation is, perforce, a nullity. Not only was the Ohio Court without power to confirm after the filing of the petition in bankruptcy but such power could not have been conferred upon it, since the Bankruptcy Court is powerless to surrender its paramount and exclusive jurisdiction in the administration of the bankrupt's estate.[6]

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4. *Taylor* v. *Sternberg*, 293 U. S. 470, 473.
*In re Watts*, 190 U. S. 1, 27.
*Moore* v. *Scott* (C. A. 9, 1932), 55 F. (2d) 863, 865.

5. *Soutter* v. *M. & M. R. Co.*, 72 U. S. 5 Wall. 660, 662.
*Reed* v. *Radigan*, 42 Ohio State 292, 294.

6. *Isaacs* v. *Hobbs Tie and Timber Co.*, 282 U. S. 734, 739.
*United States Fidelity & G. Co.* v. *Bray*, 225 U. S. 205.
*In re Diamond's Estate* (C. A. 6), 259 F. 70, 73, *et seq.*

Petitioner, in a letter of January 9, 1951, to the respondents, stated that it would amend its petition *inter alia* to cite *Jelks* v. *Aetna Life Ins. Co.* (C. A. 10), 134 F. (2d) 870, for the proposition that where a purchaser at a judicial sale becomes the equitable owner prior to confirmation, the Bankruptcy Court acquires no jurisdiction over the property sold. As petitioner points out in its letter, the proceeding in that case was under Section 75 of the Bankruptcy Act. To secure the relief under that section the debtor must have some interest in the property sought to be affected. In view of the fact that the debtor's property there had been foreclosed in the state court and a sale had, which, by virtue of the statutes of Oklahoma, divested the debtor of all equity of redemption, the court held that the debtor had no interest in the property under the express provisions of Section 75 of the Bankruptcy Act as to permit him thereafter to seek the relief afforded by the Act. This case does not in any way infringe upon the well settled law that the jurisdiction of the Bankruptcy Court is paramount and exclusive over the assets of a debtor in the hands of a receiver appointed in an insolvency proceeding within four months prior to bankruptcy.

## IV.

**The Proviso of Section 67 a(3) of the Bankruptcy Act Affords the Petitioner No Relief, Since the Petitioner, as the Highest Bidder at a Judicial Sale Subject to Confirmation, Had Not Acquired the Title of a Bona Fide Purchaser.**

Petitioner urges (petition p. 8) that Ohio law should determine the title and the rights acquired by it as the highest bidder at the Ohio receiver's sale, and that under Ohio law, where no ground exists for setting the sale aside, the highest bidder is the equitable owner and has

title to the property which is protected by the proviso of Section 67a(3) (Appendix p. 17). The law of Ohio, as will be shown, does not differ from applicable decisions of United States Courts that judicial sales are not complete prior to confirmation; that the highest bidder is not a purchaser; and that he is not vested with even equitable title prior to confirmation.[7]

While certain of the cases cited by the Court of Appeals (R. 324), and herein set forth, involved proceedings in bankruptcy and in admiralty, the statements of the courts are statements of the law pertaining generally to judicial sales.

Albeit the law of Ohio does not differ from the law as expressed in the decisions of the United States Courts, the sale in the instant case ordered by the Ohio Court (a United States District Court) was not pursuant to Ohio law, but was governed by the provisions of Section 2004 of Title 28 U. S. C. which provides in pertinent part as follows:

> "Any personalty sold under any order or decree of any court of the United States shall be sold in accordance with Section 2001 of this title, unless the court orders otherwise."

The conditions of the sale thus are governed by the Federal statute and the rights acquired by the petitioner as the highest bidder prior to confirmation while the sale

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7. *In re Klein's Rapid Shoe Repair Co.* (C. A. 2, 1931), 54 F. (2d) 495, 496.
*Hartford Accident & Indemnity Co.* v. *Crow* (C. A. 6, 1936), 83 F. (2d) 386, 387.
*Matter of Wolke Lead Batteries Company* (C. A. 6, 1923), 294 F. 509, 510.
*The East Hampton* (C. A. 2, 1931), 48 F. (2d) 542, 544.
*In re Realty Foundation* (C. A. 2, 1935), 75 F. (2d) 286, 288.
*Heller* v. *Lamar* (App. D. C.), 77 F. (2d) 389, 390.
*Brennan* v. *Trimpert Rough Hat Co.* (D. C. Conn., 1934), 8 F. Supp. 926, 928.

was still incomplete, are governed by applicable decisions of the United States Courts pertaining to judicial sales.

The Rules of Decision Act, Title 28 U. S. C., sec. 1652, and *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, can have no applicability, since the Ohio receiver's sale was governed by an act of Congress (Title 28, U. S. C., sec. 2004).

Petitioner, in the letter dated January 9, 1951, addressed to respondents, stated that its petition for certiorari was intended to be amended *inter alia* to cite *State Bank of Hardinsburg* v. *Brown,* 317 U. S. 135, apparently for the proposition that state law is determinative of the effect of a judicial sale. That case involved a proceeding under Section 75 of the Bankruptcy Act relating to Agricultural Compositions and Extensions. The sole issue was whether the farmer debtor had any interest in his mortgaged premises as to secure the relief available under Section 75 where, at the time of the filing of his petition, the mortgaged premises had been foreclosed in the state court, the property sold and under State Statute he was divested by virtue of the sale of the equity of redemption. The debtor, having lost his equity of redemption, had no interest under the express provisions of Section 75 as to make available the relief under the Act. By no process of reasoning can the foregoing case be considered as bearing even remotely on the question of applicability of local law to the case at bar.

If we assumed, *arguendo,* that the laws of Ohio are applicable in determining the interest in the property acquired by the petitioner at the Ohio receiver's sale, the fact is that the Ohio courts also hold that prior to confirmation the highest bidder at a judicial sale, subject to confirmation, acquires no vested right in the property[8]

8. *Reed* v. *Radigan* (1884), 42 Ohio State, 292, 294; 24 Ohio Jurisprudence 79.

and the sale is not complete until confirmation;[9] prior to which the debtor is a preferred proposer and not the purchaser.[10]

The Supreme Court of Ohio in *Reed* v. *Radigan* (1884), 42 Ohio State 292, stated at page 294:

> "It will be found upon an examination of the authorities, that in states where confirmation is required, the purchaser obtains no vested rights until after the sale is confirmed * * *."

In *Weir* v. *Snider Saw Mill Co.* (1913), 88 Ohio State 424, the court stated at page 430:

> "It was a sale made by a court of competent jurisdiction in a pending proceeding by an officer authorized by law for that purpose, and confirmation was necessary. The sale in question was, therefore, a judicial sale, a distinguishing feature of which, as has been held by this court, is that it must be confirmed by the court before it will be complete."

The Court of Appeals for the 6th Circuit, applying Ohio law in *Hoyd* v. *Citizens Bank of Albany Co.* (1937), 89 F. (2d) 105, 108, held that the debtor's interest in his property is not lost upon sale but only upon confirmation, since under Ohio law a judicial sale is not complete until confirmation. While this latter case involves a statute of Ohio, the requirement of confirmation before a judicial sale is complete obtains in all judicial sales. It is apparent, therefore, that under Ohio law the petitioner acquired no vested rights in the property prior to confirmation and that the title to the property was in the debtor at the time of the filing of the bankruptcy petition and concurrenly therewith title became vested, under the pro-

9. *Weir* v. *Snider Saw Mill Co.* (1913), 88 Ohio State, 424, 430.
*Howell* v. *French* (1944), 74 O. App. 257.
*Beaumont* v. *Herrick*, 24 Ohio State 456.
24 Ohio Jurisprudence 60.

10. 24 Ohio Jurisprudence 79.

visions of Section 70a of the Bankruptcy Act, in the trustees in bankruptcy later elected.

Petitioner relies only on *Parker* v. *Storts* (1864), 15 Ohio State 351, 354, in support of its claim that the highest bidder at a judicial sale is the equitable owner of the property prior to confirmation. In that case the court was called upon to determine, *after confirmation,* the rights of the debtor as against the purchaser at the sale to crops planted by the debtor in the period between sale and confirmation. The court, considering the rights of the parties in the light of a confirmed sale, held that the crops belonged to the purchaser and that the debtor could not by his unauthorized act prolong his possession of the real estate. The court was not dealing with an unconfirmed sale, as in the instant case.

Treating the highest bidder as the equitable owner prior to confirmation is a legal fiction which the Ohio Courts employ after confirmation, under certain circumstances, to protect the purchaser. As an Ohio Court said in *Johnson* v. *Cincinnati,* 11 O. C. C. (N. S.) 344, 346:

> "This is a fiction of the law founded in equity, and is for the protection of the purchaser and goes no further. It does not mean that the purchaser was the owner before the confirmation of the sale."

The decision in *Parker* v. *Storts,* 15 Ohio State, 351, has no persuasive effect in so far as the status of a bidder at an unconfirmed judicial sale is concerned and can have no applicability where, as in the instant case, the Ohio Court could not, after supervising bankruptcy, confirm the sale.

Subsequent to *Parker* v. *Storts,* 15 Ohio State, 351, which was decided in 1864, are the decisions of the Supreme Court of Ohio in *Reed* v. *Radigan* (1884), 42 Ohio State 292, and *Weir* v. *Snider Saw Mill Co.* (1913), 88 Ohio State 424, and the decision of the United States Court of Appeals for

the 6th Circuit, in *Hoyd* v. *Citizens Bank of Albany Co.* (1937), 89 F. (2d) 105, to the effect that in Ohio the highest bidder at a judicial sale is not vested with any rights and that prior to confirmation the title to the property remains in the debtor.

Petitioner, at page 9 of its petition, refers to *Oviatt* v. *Brown*, 14 Ohio 285 and to *Boyd* v. *Longworth*, 11 Ohio 235. Both of these cases involve a sheriff's sale, which by Ohio statute relating to sheriff's sales, vested title in the purchaser at the date of sale. These cases can have no applicability to a judicial sale by a receiver made, as here, subject to confirmation by the court of his appointment.

The argument of the petitioner commencing at page 11 of its petition, that the appointment of the Ohio receiver was the levy of an equitable execution upon all assets coming into the receiver's possession and fastened a judicial lien thereon, is not material or relevant because the petitioner did not, as the highest bidder, acquire the title of a bona fide purchaser within the proviso of Section 67a(3) (Appendix, p. 17).

## V.

### The Decision of the Court of Appeals Is Not Contrary to Any Policy Concerning the Stability of Judicial Sales.

The policy anent the maintenance of the stability of judicial sales is that a completed sale where title has passed shall not be avoided. This is the plain language of and the only construction that can be given to Section 67a(3) of the Bankruptcy Act. If it be otherwise, then the pronouncement of this court in *Taylor* v. *Sternberg*, 293 U. S. 470, and the provisions of Sections 69d and 70a(5) of the Bankruptcy Act are nullified, because the paramount jurisdiction of the bankruptcy court could be rendered impo-

tent and the title of the trustees in bankruptcy divested by the order of the non-bankruptcy court.

Every bidder at a judicial sale must know that his bid must be confirmed before he acquires the property and that the possible intervention of the superior jurisdiction of the bankruptcy court always exists as a limitation on the non-bankruptcy court's power to vest title in the bidder by confirmation. In this case such knowledge was real for as petitioner states in its petition at page 14 "bankruptcy commonly follows in the wake of a judicial sale".

**Conclusion.**

The decision of the Court of Appeals is clearly correct. It is based on the applicable decisions of this Court and the provisions of the Bankruptcy Act. It is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted.

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## APPENDIX.

Act of June 22, 1938, c. 575, 52 Stat. 840:

"Sec. 67 (Title 11, U. S. C., sec. 107). LIENS AND FRAUDULENT TRANSFERS.

"a.(1) Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition in bankruptcy * * * by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent * * *.

* * * * *

"(3) The property affected by any lien deemed null and void under the provisions of paragraphs (1) and (2) of this subdivision a shall be discharged from such lien, and such property * * * shall pass to the trustee or debtor, as the case may be * * * *Provided, however*, That the title of a bona-fide purchaser of such property shall be valid, but if such title is acquired otherwise than at a judicial sale held to enforce such lien, it shall be valid only to the extent of the present consideration paid for such property."

Act of June 22, 1938, c. 575, 52 Stat. 879:

"Sec. 110 (Title 11, U. S. C., sec. 70). TITLE TO PROPERTY.

"a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition in bankruptcy or of the original petition proposing an arrangement or plan under this title, except insofar as it is to property which is held to be exempt, to all * * *

* * * * *

"(5) property including rights of action, which prior to the filing of the petition he could by any means have transferred * * *."